No. 17-587

In the Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

the interests of state governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages,

representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an interna-

tional clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and current-

ly has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

This case directly impacts the interests of *amici* and their members. All state political subdivisions include special districts. If the Ninth Circuit's decision is left in place, small special districts in the Ninth Circuit and nationally will face daunting financial exposure, exposure that their small private employer counterparts do not face. *Amici* have a strong interest in ensuring that small special districts remain financially viable and able to provide the important services to the public they were designed to deliver. The Ninth Circuit's decision imperils that interest, and it should be reversed.

SUMMARY OF ARGUMENT

The undersigned *amici* urge this Court to reverse the decision below. First, special districts are a critical part of the web of state and local governments, providing services that are essential to public health and safe-

ty. Special districts are ubiquitous, numbering in the tens of thousands; small special districts like Petitioner may have only a few employees.

Created based on citizen demand, they provide services like fire protection (as in the case of Petitioner), water supply, hospital services, highway services, and other services without which day-to-day life would grind to a halt. Small special districts like Petitioner have lean budgets and lean staffs, ill-equipped to handle expensive employment discrimination lawsuits, just as their small private employer counterparts are similarly ill-equipped to do. Exposure to discrimination lawsuits would force a small special district to make severe budget cuts, making it impossible to deliver critical services on which residents depend.

Second, small public sector employers are particularly vulnerable, sometimes operating with only a handful of staff. In rural special districts, these concerns are heightened. There are fewer alternatives to layoffs and terminations when budget cuts must be made. Small, rural special districts may not

have other positions or locations to which they can transfer an employee in lieu of termination or layoffs. When resources are strained, already-leanly staffed special districts encountering employment discrimination lawsuits may find it impossible to remain financially viable.

Finally, "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Ninth Circuit's one-size-fits-all interpretation of Section 630(b) is inconsistent with principles of federalism. Small state and local government entities must have the latitude to staff their projects as they see fit, responsive to local needs and in line with particular project goals, without the financial burden of complying with a complex federal regime. The fact that these needs differ is illustrated by the different age discrimination statutes enacted by the States with a variety of minimum employee thresholds. If left in place, the decision below imposes burdens on small special districts like Petitioner disproportionate to their size, all in ignorance of the

local needs of the affected residents or the mission of the particular special district.

For these reasons, as well as the reasons discussed by Petitioner and fellow *amici*, the Court should reverse the decision of the court below.

ARGUMENT

I. Residents in Tens of Thousands of Municipalities Rely on Special District Governments To Provide Needed Services, Many of Which Are Essential to the Public's Health and Safety.

Special districts, like all state and local government, serve the public good. They provide many critical services to the community, exemplified by Petitioner Mount Lemmon Fire District, responsible for providing "Fire Protection, EMS, Rescue and Public Assistance to a 12.5 square mile area of the Santa Catalina Mountains in the Coronado National Forest." http://www.mtlemmonfire.org. Nationwide, thousands of municipalities rely on special districts for fire services. *See* U.S. Census Bureau, *Special District Governments by*

Function and State: 2012—United States—States, 2012 Census of Governments, https://tinyurl.com/y8bdha3h; U.S. Census Bureau, *Local Governments by Type and State: 2012—United States—States 2012 Census of Governments*, https://tinyurl.com/j2348jk; Evelina R. Moulder, *Police and Fire Personnel, Salaries, and Expenditures for 2013*, MUNICIPAL YEAR BOOK 2014 113-14 (ICMA Press 2014).

Although small special districts may only have a few employees, there are thousands of special districts in the Ninth Circuit and tens of thousands nationwide.[2] The U.S.

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[2] In Arizona, where this lawsuit was brought, there were 326 special districts in 2012. *See* U.S. Census Bureau, *Local Governments by Type and State: 2012—United States—States 2012 Census of Governments*, https://tinyurl.com/j2348jk. In California, there were 2,861 special districts; in Washington 1,285; in Oregon 1,035; in Idaho 806; in Montana 763; and in Nevada 139. *See id.* Thus, in 2012, there were a total of 7,215 special districts within the Ninth Circuit. Of Arizona's 326 special district governments, almost half (156) provided fire protection in 2012. *See* U.S. Census Bureau, *Special District Governments by Function and State:*

Census Bureau enumerated 38,266 special districts in 2012. *See* U.S. Census Bureau, *Population of Interest—Special Districts*, https://tinyurl.com/ya2v6uum.

Special district governments are "independent, special purpose governmental units that exist as separate entities with substantial administrative and fiscal independence from general purpose local governments." *Id.*[3] Special districts are governed by a board. Some boards are elected by the public, but most are appointed by the states, counties, or municipalities that have joined together to form the special district. *See* Nat'l League of Cities, *Local US Governments*, https://tinyurl.com/ycxecblt. Special districts raise money by levying ad valorem taxes, and some may, assuming they get voter approval, issue bonds. *See, e.g.*, U.S.

2012—United States—States, 2012 Census of Governments, https://tinyurl.com/y8bdha3h. Petitioner Mount Lemmon Fire District is one of those 156.

[3] According to the U.S. Census Bureau, the term excludes school district governments, which are defined as a separate governmental category. *Id.*

Census Bureau, *Individual State Descriptions: 2012, 2012 Census of Governments* 12, 25, 77, 176, https://tinyurl.com/ybk3q2wh.

Created to finance, construct, operate, and maintain capital infrastructure, facilities, and services, special districts perform one or a limited number of specialized services. That service could be anything from fire protection to mosquito abatement to cemetery upkeep. *See id.* Specifically, of the 38,266 special district governments enumerated by the U.S. Census Bureau in 2012, 5,865 provided fire protection; 3,522 provided water supply; 3,438 provided housing and community development; 3,248 provided drainage and flood control; 2,565 provided soil and water conservation; 1,909 provided sewerage; 1,705 provided library services; 1,692 provided cemetery services; 1,522 provided some other form of natural resources services; 1,433 provided parks and recreation; 1,099 provided highway services; 932 provided health services; 666 provided hospital services; 593 provided other utility district services; 492 provided air transportation services; 462 provided solid waste management; 223 provided industrial develop-

ment and mortgage credit; 178 provided education services; 171 provided some other form of transportation services; and 73 provided welfare services. *See* U.S. Census Bureau, *Special-District Governments by Function and State: 2012—United States—States*, 2012 Census of Governments, https://tinyurl.com/y8bdha3h. In addition, there were 1,243 other single-function districts and 5,235 multiple function districts. *See id.*

Special districts are created for a number of reasons, chief among them that "citizens demand services." Barbara Coyle McCabe, *Special District Formation Among the States*, 32 ST. & LOC. GOV'T REV. 121, 124 (2000). For example, "a growing area might desire additional services beyond those offered by a county, but not want the full range of services provided by municipal government." Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417, 446-47 (2016). Or a special district may be created because it "allow[s] the tailoring of service provision to geographic reality rather than preexisting political boundaries"—*e.g.*, draw-

ing boundaries that facilitate quick response times or that deal with the presence of lakes or rivers. *Id.*

A third reason is that special districts offer an avenue for local governments to issue more debt than state-imposed debt, tax, or spending limits permit; special districts are exempt from such limitations. *Id.*; *see also* U.S. Census Bureau, *Gov't Finances: Finances of Special Districts* VI (1992), *available at* https://tinyurl.com/yd3494w2 ("As new programs are initiated, or new services required, the establishment of special districts may reduce the need to increase the burden on general purpose governments which may be unable to meet the fiscal requirements necessary to implement these new programs. Debt and tax limitations are further stimulants for creating special districts for raising both capital construction and operation expenditure funds."). Indeed, "[i]ndebtedness is important for special district governments because many of them have as one of their primary purposes the financing of governmental activity through the issuance of debt." *Id.* at VIII.

Special districts can also reduce the budgetary pressure on local governments by providing services free from state-imposed administrative mandates on local governments. Kazis, 48 URB. LAW. at 447. And "[l]ocal communities have long used special districts as a means to overcome collective action problems in the provision of services with public good qualities." Barton H. Thompson, Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 261, 306 (2000) (using as examples farmers forming "irrigation districts to import and distribute water supplies[,] . . . pest control districts to exterminate crop-threatening insects[,] [and] [r]esidents of flood-prone areas . . . form[ing] flood control districts to finance dams and other engineering control measures.").

As noted by Petitioner in its *certiorari* briefing, Mount Lemmon Fire District, like other small special fire districts, has a modest budget. *See* ARIZ. REV. STAT. ANN. § 48-807; Arizona Fire Dist. Ass'n, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, http://tinyurl.com/y7sybnva; *see also* Cert. Pet. 8; Mount Lemmon's Rule 56.1 Statement of Facts, *Guido v. Mount Lemmon*

Fire Dist., No. 13-cv-00216-TUC-JAS (D. Ariz. Aug. 8, 2014), ECF No. 69 ("SOF"), at Ex. 3 (noting that $67,000 was 13% of Mount Lemmon's 2009 operating budget).

Mount Lemmon Fire District is also leanly staffed, numbering just eleven full-time employees in 2009. *See* SOF ¶ 16. Budget cuts have a particularly dramatic impact on small special districts. *See, e.g.*, *County's Tiny Districts Hit Hard by State Budget Cuts*, LA TIMES (Sept. 7, 1992), https://tinyurl.com/ydxlmblb ("Now comes the agonizing decision. If this means layoffs, who among the grand total of five firefighters in the department must go? . . . [The fire chief] said . . . 'It could cause me to lose two people.'").

Although some special districts have been criticized for lack of transparency with respect to spending the monies they have raised, there are no such concerns regarding Mount Lemmon Fire District. As noted by Petitioner in its *certiorari* briefing, the budget shortfall created by a drop in property tax revenue led to multiple efforts to raise

money—even resorting to bake sales. Cert. Pet. 8 (citing SOF ¶¶ 1-11).

State and local governments as well as non-governmental organizations are addressing these criticisms in a number of ways, including legislation and incentive programs. *See, e.g., Greater Chicago Mass Transit Transparency and Accountability Portal*, https://tinyurl.com/ydhwb5yk (established through legislation); Dep't for Local Gov't, *Special Purpose Government Entities Financial Disclosure Reporting Portal*, https://tinyurl.com/y9j533o4 (established through legislation); Texas Comptroller of Public Accounts, *Transparency Stars*, https://tinyurl.com/y9j9dbpd (incentive); Government Finance Officers Ass'n, *Popular Annual Financial Reporting Award Program*, https://tinyurl.com/yckzmvq2 (incentive); Special District Leadership Foundation, *District Transparency Certificate of Excellence*, http://www.sdlf.org/transparency (incentive).

As the foregoing demonstrates, special districts are a key conduit of services to the public. Many of these services are essential

to the state and local government mission of maintaining public health and safety. Imposing litigation expenses on small special districts that would necessitate severe budget cuts threatens the ability of small special districts to deliver those services. Reversal of the decision below is warranted.

II. Congress Had Good Reasons To Exempt Small Government Entities.

Congress has passed other federal employment statutes that treat small public sector and small private sector employers with parity. For example, Congress amended section 701 of Title VII to cover States and local government subdivisions but did so with an eye to parity, requiring the same 15-employee minimum for both public and private employers. *See* Pub. L. No. 92-261 § 701(b), 86 Stat. 103 (1972); *see also Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The Americans with Disabilities Act also applies to both private and public sector employers with the same minimum number of employees. *See* 42 U.S.C. §§ 12111(5)(A), 12131(1)(B).

The legislative history of section 630(b)(2) does not explicitly address the minimum employee requirement. *See Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998). However, it memorializes Congress's decision to include agencies and instrumentalities within the ADEA definition of "employer," reflecting Congress's intention to "treat both public and private employers alike, with 'one set of rules.'" *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *see also Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271-72 (7th Cir. 1986) (discussing legislative history of ADEA) ("the legislative histories of both the ADEA and Title VII amendments indicate that Congress's main purpose in amending the statutes was to put public and private employers on the same footing.") (citing Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law*, at 17 (1973) (supporting extension of the ADEA because "it is difficult to see why one set of rules should apply to private industry and varying standards to government"); H.R. REP. NO. 257, 93d Cong., 2d Sess. (1974) (recommending addition of public employers to the ADEA as well as lowering the minimum number of em-

ployees without drawing distinction between coverage of public and private employers); 120 CONG. REC. 8768 (1974) ("the passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector.") (statement of Sen. Bentsen)).

In addition, "[t]he ADEA was modeled in large part on Title VII." *Morelli*, 141 F.3d at 45. Courts have identified reasons for Title VII's minimum-employee requirement, including "the burdens of compliance and potential litigation costs, the protection of intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the constitutionality of Title VII under the Commerce Clause." *Id.* (internal quotation marks and citations omitted); *see also Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995) (citing relevant legislative history of Title VII) ("Congress decided to protect small employers in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims.")

(internal quotation marks and citation omitted), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1205 (2006) (describing Congress's debates leading to enactment of Title VII and its 1972 amendment as including discussion of "reliev[ing] small firms of the otherwise disproportionate costs they might bear under the new law" and "avoid[ing] over-extension of the [EEOC]'s limited resources.").

Small government entities, and in particular rural special districts, are particularly vulnerable to policies that endanger their financial viability.[4] Rural areas make up 72% of this country's land area and house 46 million residents. United States Dep't of Agriculture, Economic Research Service, *Rural*

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[4] It is not just local governments and special districts that have small numbers of employees; some state agencies do as well. *See, e.g., Palmer*, 154 F.3d at 894 (five employees).

America at a Glance (2017 ed.), ECONOMIC INFO. BULLETIN NO. E1B-182, at 1 (Nov. 2017), https://tinyurl.com/yblcgsbw ("*Rural America at a Glance*"). Rural areas have fewer resources, fewer opportunities, and a shrinking population.

According to the United States Department of Agriculture, "[r]ural areas tend to have significantly fewer financial, professional, scientific and information services activities that concentrate in urban economies." U.S. Dep't of Agriculture, *Economic Research Service, Business & Industry Overview,* https://tinyurl.com/ycp4nhzw. Moreover, "the rural population is shrinking for the first time on record, due to several factors, including long-term outmigration of young adults, fewer births, increased mortality among working-age adults, and an aging population." *Rural America at a Glance* 1; *see also* Angelo Verzoni, *Shrinking Resources, Growing Concern,* NFPA JOURNAL (2017), https://tinyurl.com/yclryvgn ("*Shrinking Resources*") ("[R]ural America is becoming more rural. The continued decline suggests that many problems facing the rural fire service will only become more prominent

as resources of all kinds—human, technological, monetary, and more—become increasingly scarce."). A rural-urban income gap has persisted since 2007, "stem[ming] partly from lower levels of labor force participation in rural areas due to an older population, higher disability rates, and other factors." *Rural America at a Glance* 4; *see also* Gracy Olmstead, *Stuck in America's Struggling Small Towns*, THE AMERICAN CONSERVATIVE (Feb. 5, 2018), https://tinyurl.com/ycb48sgk (Much of rural America . . . is growing 'older, poorer, and less educated.'") (citation omitted); Alana Semuels, *The Graying of Rural America*, THE ATLANTIC (June 2, 2016), *available at* https://tinyurl.com/jy326a6 ("Population decline in rural America is especially concentrated in the West.").

The vulnerability of special districts located in these areas is evidenced in a number of ways. To begin with, "[r]ural America has long been known to be at higher risk for fire and life safety threats, [because] [w]ith sparsely populated, large expanses of land, it can be hard for the fire service in rural communities to reach people—both physically and in terms of education and enforce-

ment." *See Shrinking Resources*, https://tinyurl.com/yclryvgn. NFPA data presents a stark picture: "The rate of fires per thousand population in communities of 1 million or more is 3.1 . . . [t]he national average is 4.5. For communities of 2,500 to 4,999, it's 6.8, and for communities under 2,500, it's 10.8—more than double the national average." *Id.* The statistics are equally bleak for fire deaths: "[T]he rate of civilian fire deaths per million people in communities of 1 million or more is six, almost half the national average of 10.9. For communities of 2,500 to 4,999, it's 19.3, and for communities of under 2,500, it's 20.9." *Id.*

Layoffs and terminations may be more common in small, rural special districts due to the need to cut costs. There are fewer alternatives, and their resources are already strained. *See, e.g.*, Cert. Pet. 8 (describing how drop in property tax revenue created a budget shortfall for Mount Lemmon Fire District, giving rise to the need to lay off Respondents for six months when other efforts, including bake sales and supplemental work on behalf of federal authorities, failed to raise enough money); *see also* Ryan Sum-

merlin, *Carbondale Fire District Seeks Status Quo Funding Via Voter Approval*, ASPEN TIMES (Oct. 28, 2017), *available at* https://tinyurl.com/y7tzwz7k (noting that if the fire district's revenue is reduced, the fire district would have to reduce its staff: "that reduction would have to come from somewhere, and it would ultimately come out of people.").

Concurrent with such lay-offs and terminations is a rise in expensive employment discrimination claims. These costs are even more challenging for small special districts that operate on fixed budgets. *See, e.g., Shrinking Resources*, https://tinyurl.com/yclryvgn ("Every fire department faces challenges, but they're often more pronounced for small departments. NFPA's fourth and most recent Needs Assessment Survey of the U.S. Fire Service . . . exposed striking deficiencies in everything from apparatus to personal protective equipment (PPE) to training in departments protecting populations of 5,000 people or fewer."). And many of those rural budgets are shrinking. *See, e.g., Rural Colorado Fire Departments Could Get Badly Hurt by*

Budget Cuts, CBS4 Denver (Mar. 30, 2017), *available at* https://tinyurl.com/y99qlq5d (describing district as the first responder for 280 square miles as having only 16 full-time employees and warning that "deep budget cuts" could "put public safety at risk" because "some rural departments . . . wouldn't be able to absorb those losses . . . they would have to close their doors."); *Grand Traverse Rural Fire Chief Resigns Amid Budget Frustrations*, 9&10 News (Dec. 22, 2016), *available at* https://tinyurl.com/ybs5vzbr.

Moreover, lawsuits may be more common in small, rural special districts because they may not have the luxury of transferring employees to another position or location. There are fewer positions and locations to choose from. *See, e.g., Palmer*, 154 F.3d at 897 ("Congress based its twenty-employee minimum on 'the practical consideration that a larger employer with more varied jobs could more constructively utilize an older worker's skills.'") (quoting *Kelly*, 801 F.2d at 272 n.3). In *Kelly*, the Park District had just one full-time, year-round employee, and in a four-year span, it never had more than three of its thirteen employees work five days in

each of twenty or more weeks in any of those years. 801 F.2d at 270. The Arkansas Council on Economic Education in *Palmer* had only five employees. 154 F.3d at 894. And as noted, Petitioner Mount Lemmon Fire District has only eleven employees. *See supra* p. 15.

Nor can special districts simply pass along the liability costs to larger State entities as Respondents have argued. *See* Cert. Opp. 14; *but see* Cert. Reply 12. In reality, most special districts, including Mount Lemmon Fire District, are established by citizen vote, have independent budgets, and are governed by a dedicated board. Cert. Pet. 6-7; Cert. Reply 12; *see, e.g.*, ARIZ. REV. STAT. ANN. § 48-803; *see also, e.g.*, U.S. Census Bureau, *Individual State Descriptions: 2012, 2012 Census of Governments* 12, https://tinyurl.com/ybk3q2wh ("Districts to provide fire protection in unincorporated areas are formed by petition to the county board of supervisors followed by a public hearing. Districts are governed by an elected board of three to seven members . . . .") (Arizona fire districts); *id.* at 25 ("established by the county board of supervisors upon peti-

tion of voters if approved by the local agency formation commission and the voters at referendum") (California fire districts); *id.* at 77 ("fire protection districts are established by the county commissioners on petition of landowners and after a public hearing and referendum") (Idaho fire districts); *id.* at 176 ("[a]reas to provide fire protection are created by resolution to the county commissioners upon petition of property owners and after public hearing. A board of trustees, either elected by the property owners or appointed by the county commissioners, governs each fire service area.") (Montana fire districts).

As Petitioner noted in its Reply at the *certiorari* stage, the additional costs imposed on small special districts by ADEA liability will not be offset by insurance pools. Cert. Reply 11. Indeed, those costs will simply be repackaged as a spike in insurance premiums, imposing a heavy financial burden on the special districts. Such a burden is the precursor to budget cuts and, inevitably, a discontinuation of often vital public services. *Id.*; *see also* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1144

(June 2016) ("[S]maller agencies that pay nothing from their budgets towards lawsuits may nevertheless have their very existence threatened if liability insurers raise premiums or terminate coverage in response to large payouts."); *id.* at 1149 ("[S]maller jurisdictions that rely primarily on outside insurance report that a spike in suits may cause an insurer to demand changes . . . as a condition of continued coverage; agencies that do not comply have lost their insurance coverage and ceased to exist. . . . [P]ressures and obligations imposed by outside insurers are an important and underappreciated consequence of liability for smaller law enforcement agencies."); *id.* at 1190-91 (discussing "several reports of police department closings caused by insurers' premium increases or decisions to end coverage."). And when special districts providing fire services close, tragedy strikes. *See, e.g.,* Rachel Dornhelm, *Fire Stations Cut Services as City Budgets Shrink* (Sept. 29, 2017), *available at* https://tinyurl.com/y845bwmh (describing how during a "big house fire . . . the engine closest to the burning home was closed, and by the time another company arrived from farther away, a second house had

caught fire" and how on another occasion, "relatives brought a choking 2-year-old to the fire station down their block, [which] was closed that day for budget reasons [and because] it took 9 ½ minutes for a paramedic to arrive, [t]he boy did not survive.").

Congress knew that, in light of all small special districts (and other small state and local governments) do for their communities, there is no principled reason for treating small public sector employers more harshly than small private sector employers. Congress's exemption of small special district governments made good sense. The decision below does not.

III. The Decision Below Violates the Principles of Federalism by Making the Smallest State and Local Government Entities Subject to a Federal Law that Imposes a Burden Disproportionate to their Size.

The one-size-fits-all approach taken by the decision below glosses over the very real challenges faced by small public sector employers. Moreover, it tramples on the principles of federalism. "Federalism is more

than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011) (citation and internal quotation marks omitted). Indeed, "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. and O'Connor, J., concurring).

The Constitution's framework of dual sovereignty gave rise to the "plain statement rule" of statutory construction in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), discussed in Petitioner's brief. *See* Pet. Br. 15, 37; *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.") (citation omitted). Principles of federalism have led this Court to consistently refer to the plain statement rule to justify interpret-

ing federal laws not to "interpos[e] federal authority between a State and its municipal subdivisions." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004); *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437-39 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). Although the subdivisions themselves are not sovereign actors, *see, e.g., Alden v. Me.*, 527 U.S. 706, 756 (1999), Congress must still lightly intrude on powers delegated to them by the States.

As this Court has held, "[t]he principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Mortier*, 501 U.S. at 607-08 (internal quotation marks and alterations omitted); *see also Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978).

Most States, including Arizona, have enacted statutes to prohibit age-based employment decisions by some of the small public sector employers who have less than 20 employees. *See* Nat'l Conf. of State Legisla-

tures, *State Employment-Related Discrimination Statutes* (July 2015), https://tinyurl.com/ybzxb59d. However, the minimum number of employees varies by State, evidence that each State has exercised its autonomy to set liability thresholds according to the needs of its particular political subdivisions. *See id.* (*comparing* ALA. CODE § 25-1-20, et seq. (setting threshold at 20 employees or more) *with, e.g.,* ALASKA STAT. ANN. § 18.80, et seq. (setting threshold at 1 or more employees); WEST'S ANN. CAL. GOV. CODE § 12900, et seq. (setting threshold at 5 or more employees); WASH. REV. CODE ANN. § 49.60.010, et seq. (setting threshold at 8 or more employees)). Indeed, each State is in the best position to balance the important but competing issues of anti-discrimination legislation and a small employer's ability to withstand potentially crippling litigation. The Ninth Circuit's decision blows through the carefully calibrated local thresholds in these States like a windstorm. But one size does not fit all—what makes sense for Maine and Vermont, the states with the highest rural populations, and what makes sense for California and New Jersey, the states with the most urban populations, will vary great-

ly. *See Growth in Urban Population Outpaces Rest of Nation*, Census Bureau Reports, *available at* https://tinyurl.com/godok3n. Ultimately, the citizens expecting to receive services from the affected special districts will end up paying the price.

In enacting section 630(b), Congress was legislating against the backdrop of the principles of federalism and well established interests and expectations of the States. Interpreting section 630(b) as applying to all public sector employers, even to special districts of very small size, completely loses sight of the careful balance struck by this Court, in countless situations, between federal and state sovereigns. As noted, if the decision below is affirmed, "States may be pressured into attempting compliance on the cheap," cutting either the amount or the quality of the services entrusted to their care. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 610 (1999).

And "[t]his danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of . . .

programs and the allocation of resources to the reviewing authority of the federal courts." *Id.* This is, of course, not to say that the ADEA should not apply to public sector employers at all; it obviously does. But the decision below tramples on these concerns in extending application of the statute to small public sector employers like Mount Lemmon Fire District, a special district working to meet the life-and-death needs entrusted to it with eleven employees. The burden placed upon such small special districts is disproportionate to their size, and this Court should rectify the Ninth Circuit's error.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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